Filed 11/6/15 P. v. Gregory CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER JOSEPH GREGORY, Defendant and Appellant.	A143143 (Del Norte County Super. Ct. No. CRF14-9189)

On appeal from his convictions following a jury trial, defendant Christopher Joseph Gregory argues the trial court made a number of instructional errors. We affirm.

BACKGROUND

Appellant was charged with resisting an executive officer (Pen. Code, § 69; count one),[1] battery upon a peace officer (§ 243, subd. (b); count two),[2] and battery upon a custodial officer (§ 243.1; count three).[3] A jury found appellant guilty of all three counts.

[1] All undesignated section references are to the Penal Code. Section 69 provides: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty," is guilty of a crime.

[2] Section 243, subdivision (b) sets forth the punishment for battery "[w]hen a battery is committed against the person of a peace officer . . . engaged in the performance of his or her duties, . . . and the person committing the offense knows or reasonably should know that the victim is a peace officer . . . engaged in the performance of his or her duties . . . ."

Prosecution Case

On April 9, 2014, at approximately 2:15 a.m., appellant walked into the booking area of the Del Norte County jail and approached the booking window. Officer Shawn Ratnour asked appellant if he could do anything for him. Appellant, who was holding a Bible, told him God was going to "hold [Ratnour] to [his] word" and "the fire was going to burn hot." Ratnour and Officer Benjamin Lafazio, who was also working in the booking area, asked appellant several times if he needed help. Appellant grew increasingly agitated, held up the Bible and shook it, and walked back and forth in front of the window. Lafazio asked appellant to leave but he did not. After about five minutes, Ratnour called Deputy Jerrin Gill for assistance in removing appellant from the lobby.

Gill asked appellant if he could help him. Appellant was "belligerent" and "agitated." He began to "rant" about an earlier arrest, calling the sheriff's office "corrupt" and telling Gill he would be held to his word. Appellant shook his Bible and swayed from side to side. Gill listened for a minute and then told appellant he needed to leave the lobby.

Appellant began moving toward the door but stopped several times to continue his "rant." Gill followed appellant outside the building, where appellant stopped and shook his Bible a few inches from Gill's face, saying Gill would be held to his word. Gill found this behavior "aggressive" and "violent." Gill reached up with one hand and moved the Bible away from his face. He placed his other hand on appellant's shoulder, using a "gentle touch."

In response, appellant punched Gill in the head. Gill tried to restrain appellant but was unsuccessful and appellant punched him twice more in the head. Other officers joined the struggle and eventually appellant was handcuffed and moved to a holding cell.

---

[3] Section 243.1 sets forth the punishment for battery "[w]hen a battery is committed against the person of a custodial officer as defined in Section 831 of the Penal Code, and the person committing the offense knows or reasonably should know that the victim is a custodial officer engaged in the performance of his or her duties, and the custodial officer is engaged in the performance of his or her duties . . . ."

Much later that same day, at approximately 11 p.m., Sergeant Gary Potter, Gill, and two other officers entered appellant's holding cell. Potter told appellant he had to change into jail clothes and be strip-searched. In response, appellant said he wanted to punch Potter in the head. Potter grabbed appellant's wrist and attempted to pull it behind appellant's back so he could be handcuffed. Appellant pulled away and began "flailing about." As Potter and another officer were "grappling" with appellant, appellant punched Potter in the head. The officers eventually were able to handcuff him.

Defense Case

Appellant testified in his own defense. On the morning in question, he went to the sheriff's office to tell the officers they should treat others how they wanted to be treated. When Gill told him to leave, appellant was leaving voluntarily but Gill "shoved" him out the door. Gill's shove did not knock appellant down or cause him to lose his balance. Once outside, appellant held his Bible approximately one foot from Gill's face. Gill pushed appellant's hand down. The push was "not gentle," but did not cause appellant to drop the Bible or lose his balance. Appellant was not afraid Gill would hurt him, but he wanted to "make a stand" and prevent Gill from "unlawful[ly] touching" him again, so he punched Gill three times.

Later that night, five officers entered appellant's cell. The officers told appellant he needed to change clothes. Appellant asked if it could be done "peaceably," and Potter replied that it could not. Appellant told Potter he did not want to punch him. Potter grabbed appellant; appellant did not punch Potter, but he did make contact with him.

DISCUSSION

I. *Lawful Performance of Duties Instruction*

The jury was instructed an element of count one is "the officer was performing his lawful duty" and an element of count two is "Gill was a peace officer performing the duties of a deputy sheriff."[4] Appellant argues the trial court erred by failing to sua sponte

[4] The jury was instructed that counts one and two referred to the early morning incident and count three referred to the late night incident.

instruct the jury that a peace officer is not lawfully performing his duties if he is using unreasonable or excessive force. (See CALCRIM No. 2670.)[5] We disagree.

Appellant did not request this instruction below. "In the absence of a request for a particular instruction, a trial court's obligation to instruct on a particular defense arises ' "only if [1] it appears that the defendant is relying on such a defense, or [2] if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." ' " (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1148.)

Appellant contends there was substantial evidence that Gill used excessive or unreasonable force, pointing to the evidence of Gill's physical contact with appellant before appellant punched him.[6] According to appellant's own testimony, neither the "shove" nor the push of appellant's arm were particularly forceful—they did not cause appellant to lose his balance or drop his Bible. Gill testified to a third contact that appellant did not testify to, touching appellant's shoulder, but Gill's testimony was this touch was "gentle." The physical contacts were made in reaction to appellant's erratic and aggressive behavior. There is no substantial evidence that Gill used unreasonable or excessive force. (See *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527 ["The question is whether a peace officer's actions were objectively reasonable based on the facts and circumstances confronting the peace officer. [Citation.] The test is ' "highly deferential to the police officer's need to protect himself and others." ' "].)[7] Accordingly, the trial court did not err by failing to sua sponte instruct the jury on this issue.

---

[5] CALCRIM No. 2670 provides in relevant part: "A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when making or attempting to make an otherwise lawful arrest or detention)." The jury was provided with CALCRIM No. 2671, an analogous instruction regarding custodial officers, in connection with count three.

[6] Appellant does not argue that it appeared he was relying on such a defense below.

[7] This case is entirely unlike *People v. Olguin* (1981) 119 Cal.App.3d 39, relied on by appellant, in which there was evidence the officers "roughed up, kicked, and beat" the defendant solely because of a "grudge" held by one of the officers. (*Id*. at pp. 43–44.)

II. *Instructions Regarding Threats By Other Officers*

At trial, the jury was instructed on self-defense in connection with count three. Appellant requested, but did not receive, the following instructions with respect to self-defense: "If you find that the officers threatened or harmed the defendant in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable," and "If you find that the defendant received a threat from someone else that he reasonably associated with the sheriff's department, you may consider that threat in deciding whether the defendant was justified in acting in self-defense."[8] In arguing for these instructions, trial counsel pointed to (1) the force used by officers earlier that day after appellant punched Gill; (2) testimony from appellant that unnamed law enforcement officers previously "harassed" him and told him, "You need to get out of town"; and (3) testimony from appellant that his friend Jose Rios died in the Del Norte County jail.

In *People v. Minifie* (1996) 13 Cal.4th 1055, our Supreme Court held "evidence of third party threats is admissible to support a claim of self-defense if there is also evidence from which the jury may find that the defendant reasonably associated the victim with those threats." (*Id.* at p. 1060.) Assuming, without deciding, the trial court erred in refusing the requested instructions, we find any error harmless.

We review for prejudice pursuant to *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (*People v. Spencer* (1996) 51 Cal.App.4th 1208, 1221 (*Spencer*) ["the *Watson* standard applies" when trial court errs by failing to grant the defendant's request for a special instruction regarding prior assaults and threats for purposes of self-defense claim].) The jury was instructed, with respect to self-defense: "When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed." "There is nothing in the instruction given that required or suggested that the jury ignore or disregard the admitted

[8] Appellant concedes the trial court did not err in refusing a third requested instruction: "Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person."

evidence of" prior threats or assaults against appellant. (*Spencer*, *supra*, at p. 1220 [finding harmless error in refusing requested instruction regarding prior assaults or threats by the victim to third parties of which the defendant was aware].) Appellant has shown no basis for us to conclude "the jury was somehow confused or misled concerning its consideration of this evidence." (*Id.* at p. 1221.)[9] Moreover, even in appellant's version of events the force used by officers that morning took place only after he repeatedly punched Gill; there was no evidence his previous "harassment" by law enforcement officers included physical threats; and there was no evidence Rios' death in jail was caused by officers' violence. We conclude it is not reasonably probable appellant would have received a more favorable result had the requested instructions been provided.

III. *Lawful Performance of Duties Instruction*

In connection with count three, the jury was instructed as follows: "The People have the burden of proving beyond a reasonable doubt that Correctional Sergeant Gary Potter was lawfully performing his duties as a custodial officer. If the People have not met this burden, you must find the defendant not guilty of Battery Against a Custodial Officer. [¶] A custodial officer is not lawfully performing his duties if he is using unreasonable or excessive force in his duties. [¶] Special rules control the use of force. [¶] A custodial officer may use reasonable force in his duties to restrain a person, to overcome resistance, to prevent escape, or in self-defense. [¶] If a person knows, or reasonably should know, that a custodial officer is restraining him, that person must not use force to resist an officer's use of reasonable force. [¶] If a custodial officer uses unreasonable or excessive force while restraining a person or overcoming a person's resistance or defending himself from a person, that person may lawfully use reasonable force to defend himself. [¶] A person uses reasonable force when he: (1) uses that degree of force that he actually believes is reasonably necessary to protect himself from the

[9] Accordingly, we reject appellant's contention that the trial court's refusal to issue the requested instructions denied him a meaningful opportunity to present his defense.

officer's use of unreasonable or excessive force; and (2) uses no more force than a reasonable person in the same situation would believe is necessary for his protection."

Appellant contends the trial court erred by instructing the jury with the last two paragraphs regarding the reasonableness of appellant's use of force. Appellant argues these instructions impermissibly "provided that the jury would have to convict [appellant] if both he and Potter had used excessive or unreasonable force."[10]

We agree the challenged instructions were not relevant. "[T]he reasonableness of the defendant's response to the officer's excessive force is relevant only where the jury is asked to decide whether the defendant is guilty of simple battery; even if the officer is not acting within the scope of his duties because of his use of excessive force, the defendant may still be guilty of simple battery if he responds with excessive force. However, where—as here—the jury's choices are limited to deciding guilt or innocence of . . . [offenses] which require the officer to be engaged in the performance of his duties, the jury must acquit if it finds the officer used excessive force, and the reasonableness of the defendant's response is irrelevant." (*People v. Castain* (1981) 122 Cal.App.3d 138, 145.)

The question is whether the jury construed the irrelevant instructions in the manner urged by appellant. "In reviewing the purportedly erroneous instructions, 'we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' [Citations.] In conducting this inquiry, we are mindful that ' "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." ' " (*People v. Frye* (1998) 18 Cal.4th 894, 957, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The jury was clearly instructed that the People have the burden of proving beyond a reasonable doubt that Potter was lawfully performing his duties; a custodial officer is not lawfully performing his duties if he uses excessive or unreasonable force; and if the People fail to meet their burden of proving Potter was

[10] Appellant did not object to the instruction below. Because we are rejecting this contention on other grounds, we need not decide whether it is forfeited.

lawfully performing his duties, "you must find the defendant not guilty of [count three]." In contrast, while the instruction on the reasonableness of a defendant's use of force may have been confusing, it did not specifically instruct the jury it could convict appellant if both he and Potter had used excessive force; nor, in light of the clear instruction on the People's burden to prove lawful performance of duties, could it have been reasonably so construed. We find no reasonable likelihood the jury construed the instruction in the manner proposed by appellant.

IV. *Lesser Included Offenses*

Appellant's final argument is the trial court erred in failing to sua sponte instruct the jury with respect to count three on the lesser included offenses of simple battery and assault. We find no prejudice from any error.

"[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*).) Appellant argues there was substantial evidence that Potter used excessive force and had therefore not been lawfully performing his duties, obligating the trial court to instruct the jury on simple battery and assault. We will assume, without deciding, the trial court erred in failing to instruct the jury on simple battery and assault.

"[I]n a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under *Watson*." (*Breverman, supra,* 19 Cal.4th at p. 178.) It is not reasonably probable appellant would have obtained a more favorable outcome had the trial court instructed the jury on simple battery and assault. According to appellant, the only physical force used by Potter before the incident underlying the charge was Potter "grabbed" him. Potter testified he and another officer "grappl[ed]" with appellant because appellant refused to cooperate with changing into jail clothes. Appellant admitted he punched an officer earlier that day and Potter testified appellant told him, before Potter had used any force at all, that appellant wanted to punch

him. It is not reasonably probable that, had the trial court instructed the jury on the lesser included charges, the jury would have concluded Potter used excessive or unreasonable force.

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.